Supreme Court, U.S.
FILED

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No. 02 300038

In The Supreme Court of the United States

Richard J. Oulton

and

Ava L. Oulton,

Petitioners,

v.

The Wyndham Foundation, Inc.,

Respondent

On Petition for Writ of Certiorari
To the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

Richard J. Oulton, Petitioner
and
Ava L. Oulton, Petitioner
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24pp

QUESTIONS PRESENTED

Richard J. Oulton and Ava L. Oulton, the Petitioners, have placed an American flag and flagpole on a portion of their residential property. The Wyndham Foundation, Inc., the Respondent, has adopted an interpretation of certain covenants and restrictions that apply to the Petitioners' residential property so as to seek the removal of the Petitioners' American flag and flagpole. The holding by the Virginia Supreme Court permits the Respondent to force the removal of the Petitioners' American flag and flagpole. This holding raises several substantial federal questions that warrant immediate review by this Court:

1. Whether the state court's decision violated the petitioners' First Amendment rights.
2. Whether the state court's decision improperly applied state law and in so doing violated the rights of these property owners.

PARTIES TO THE PROCEEDINGS

The Petitioners are Richard J. Oulton and Ava L. Oulton.

The Respondent is The Wyndham Foundation, Inc..

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In The Supreme Court of the United States

Richard J. Oulton

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The Wyndham Foundation, Inc.,

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On Petition for Writ of Certiorari
To the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

Richard J. Oulton and Ava L. Oulton respectfully submit this petition for writ of certiorari to review the judgment and opinion of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The judgment of the Circuit Court for the County of Henrico (the trial court) is not published. The Petition For Writ of Certiorari to the Supreme Court of Virginia was denied.

JURISDICTION

The trial court's ruling was entered on August 2, 2001. The Petition of Writ of Appeal to the Supreme Court of Virginia was denied on April 19, 2002. An Extension of Time to File Petition for Writ of Certiorari was granted enlarging the time to file said Petition until August 19, 2002. This Petition was timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the Constitution of the United States of America states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Richard J. Oulton and Ava L. Oulton (the "Oultons") are a married couple that purchased three lots in a planned subdivision named Wyndham located in Henrico County, Virginia. Their property in Wyndham is subject to certain restrictive covenants that are found in the Declaration of Covenants, Conditions and Restrictions for Wyndham (the "Guidelines").

Wyndham Foundation, Inc. (the "Foundation") is a property owners' association and is charged with the responsibility of managing common areas and enforcement of the Guidelines at Wyndham.

The Foundation sought equitable relief when the Oultons placed first temporary and later permanent flagpole and American flag on their property. Although flagpoles are not referred to in the Guidelines, the Foundation claimed that the flagpole was a "structure" within the definition of the Guidelines, and as such, the flagpole was subject to the restrictions contained therein. Specifically, the Foundation claimed that they had the right to rule whether something was a structure if it was not referenced in the Guidelines. The Foundation sought to force the Oultons to remove the American flag and flagpole from their property. The Oultons argued primarily that the American flag and flagpole did not constitute a structure and that certain oral promises made by Foundation representatives had caused the Foundation's ability to prohibit the flagpole to be waived.

At trial, over the Oultons' Objection, the Foundation was allowed to call an expert to testify as to whether the flagpole was a structure under the Wyndham's Guidelines. Both Oultons testified that prior to the placement of the flagpole, they informed a Wyndham representative of their intention. The Oultons also testified that they had been told by this same representative that the American flag and flagpole was not a structure and that it was not prohibited by the Guidelines.

The Oultons have maintained throughout the trial and in their appeal to the Virginia Supreme Court that 1) the actions of the Foundation violates their First Amendment protection of free speech, and 2) the restrictive covenant is not unambiguous and as such must be construed in a manner most consistent with the free use of property.

ARGUMENT

1. The Supreme Court of Virginia's Decision Violated the Oulton's First Amendment Freedom of Speech Protection

The Oultons fly their American flag as an expression of their patriotism and respect for the United States of America, and to force the removal of their flagpole denies them their freedom of speech protection.

> The Court for decades has recognized the communicative connotations of the use of flags. E.g., Stromberg v. California, 283 U.S. 359 (1931). In many of their uses flags are a form of symbolism comprising a "primitive but effective way of communicating ideas...," and "a short cut from mind to mind." Board of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

Spence v. Washington, 418 U.S. 405, 410 (1974). Despite statements to the contrary by the Foundation, the flag and the flagpole cannot be easily separated. The whole purpose of any flagpole is to fly a flag, and flags are designed to be flown from flagpoles. To "allow" flags, but not allow flagpoles is similar to allowing works of art, but not allowing the frames in which they are hung. The two items are joined by nature in such a way that one is inseparable from the other.

Although it is a private entity, the actions of the Foundation constituted state action for First Amendment purposes because in regulating property rights of landowners through its Guidelines it is exercising a function traditionally associated with sovereignty. See **Jackson v. Metropolitan Edison, Co.**, 419 U.S. 345 (1974); 95 S. Ct. 449 (1974). Moreover, because the Foundation is a creature created under state law and was enforcing rights promulgated under state law through courts of the Commonwealth of Virginia, its actions are subject to constraints of the First Amendment through the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Foundation, in general, acts in a manner indistinguishable from a governmental entity. For example, it has homeowner voters who pass rules and regulations and functions like a sub local level of government. See also **Burton v. Wilmington Parking Auth.**, 365 U.S. 715 (1961); 81 S. Ct. 856 (1961); **Marsh v. Alabama**, 326 U.S. 501 (1946); 66 S. Ct. 276 (1946); **Belk v. Chancellor of Washington Univ.**, 336 F. Supp. 45 (E.D. Mo. 1970); **Spence v. Washington**, 418 U.S. 405 (1974).

Moreover, Virginia Code Section 55-508, also known as the "Property Owners' Association Act," allows associations to create boards of directors to govern the community, gives these boards the authority to promulgate rules and regulations in relation to the use and enjoyment of private property within the community. In this regard, they act much like a governmental entity when it zones property or issues building permits. Pursuant to these laws, the boards are also authorized to levy special assessments and institute liens on lots for unpaid assessments. Therefore, the Property Owners' Association Act

confers powers upon homeowners' associations which result in their functioning in a manner resembling that of a governmental entity. Since the state enables them to do this through the Property Owners' Association Act, homeowners' associations should be treated as governmental entities. The First Amendment freedom of speech should then be applied to the regulations promulgated by the homeowners' associations just as it would to the governmental entity.

The Foundation, by utilizing special laws enacted by the government to empower homeowners' associations and by utilizing the state's court system, has entered a symbiotic relationship with the state. The state has willingly abdicated some of its duties to the Foundation. The control exercised by the Foundation is enhanced through the government. The Wyndham homeowners did not simply "opt out" of the state's system in exchange for their own private utopia, instead they became subjected to state sponsored third party rules. The situation is akin to moving your child from public school to private school only to find that the private school gets its power from the same people who run the public school. The relationship between the Oultons and the Foundation is much more than a simple contractual one. Through the enactment of the Property Owners' Association Act and through the use of the court system, the state has shifted many of its governmental powers to the Foundation. Along with this shift of power must also come the responsibility of upholding the individual landowner's constitutional right to free speech.

2. The Virginia Supreme Court's Decision Violated the Rights of the Landowners in a Way that is Contrary to the Law and Contrary to the Decisions of Other States.

Courts have been unwavering that every landowner has the right to use his property as he pleases as long as such usage is reasonable and does not invade the rights of others. See **Des Moines v. Manhattan Oil Co.**, 193 Iowa 1096, 184 N.W. 823; **Martin v. Weckerly,** 364 N.W.2d 93, (N.D. 1985); **Appeal of Perrin**, 305, 2a 42, 156 A. 305; **Heckert v. Patrick,** 472 N.E.2d 1204 (Ohio 1984). Also well established is the principle that any covenants restricting the free use of land are not favored by the law. See **Hill v. Rice**, 505 So. 2d 382 (Ala. 1987); **Wilmoth v. Wilcox**, 734 S.W.2d 656 (Tex. 1987); **St. Benedicts Dev. Corp. v. St. Benedicts Hosp.**, (Utah) 811 P. 2d 194, 160 Utah Adv. Rep.11. Before any court can uphold it, any claimed restrictions upon a landowner's property must be clearly established. See **Wiggins v. Young**, 206 Ga. 440, 57 S.E.2d 486 (1950); **Thompson v. Glenwood Community Club**, 191 Ga. 196, 12 S.E.2d 623 (1940). Across all jurisdictions, restrictive covenants are strictly construed in favor of the free use of property.

Where properly set out, restrictive covenants are, of course, valid and can be upheld by a court. The issue is whether or not the restrictive covenant was clear and unambiguous. In other words, did the landowner freely and knowingly give up its rights. The covenant will be upheld as valid where the landowner had clear and proper knowledge of the restriction and chose to enter into the contract with full knowledge of those limitations.

Restrictions are strictly construed against the grantor and any ambiguities are resolved in favor of the landowner. See **Shea v. Sargent**, 499 S.W.2d 871 (Tenn. 1973); **Mckenrick v. Savings Bank**, 174 Md. 118, 197 A. 580. Just as it is well established in jurisdictions all across the country, the principle that any ambiguities in property restrictions need to be resolved in favor of the landowner has long stood in the state of Virginia itself. See **Jernigan v. Capps**, 187 Va. 73 (1948).

This case is clearly a case that involved an ambiguity, and as such, that ambiguity should have been resolved in favor of the rights of the landowner. Nowhere in the guidelines was it expressed that a flagpole was a structure that would be governed by the restrictions. At trial, the Foundation presented evidence from an "expert" who testified that he had written the Guidelines. This witness was used to opine as to what constituted a structure within the meaning of the Guidelines. Additionally, he testified that the Guidelines gave the Foundation unfettered discretion to determine what a structure was.

This Virginia decision is clearly contrary to what the highest courts of other states have ruled for two reasons. First, since flagpoles were not expressly set out in the definition of structure, the covenant cannot be considered clear and unambiguous. There had to be an inference relied upon by the Foundation that flagpoles were structures. This information cannot be gathered simply by reading the Guidelines. Not only was the language not clear upon its face, in fact, the Foundation relied upon an expert to testify at trial regarding the definition of structure. All courts restrict the testimony of

expert witnesses to that which is beyond the knowledge and understanding of the common individual. The fact that expert testimony was used clearly demonstrates that the understanding of the terminology was beyond the average person's knowledge. Under these circumstances the covenant is ambiguous and must be construed in favor of the free use of property.

The second reason why this decision is contrary to the decisions of the high courts of other states is that the Guidelines are purposefully made ambiguous so as to give unfettered power of the Foundation over the rights of the individual landowner. As stated above, the failure to define a flagpole as a structure is an obvious ambiguity, yet the Foundation attempts to use this ambiguity, and any others that arise, to its advantage by stating that the Foundation will make a decision regarding each item not properly defined as a structure. The open-ended and uncertain nature of this provision takes the control of his own land away from the landowner and places him at the whim ~~of~~ the association. In these cases, restrictive covenants are used as weapons against the landowner rather than tools for him to protect his property. There is no clarity before the contract is entered into. This is exactly the type of situation that has caused covenants to be routinely stricken. The Virginia Supreme Courts cannot be allowed to rule in a way that is contrary to what the high courts of her sister states have ruled and in so doing ignore a basic property right that has been long upheld in our courts.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Richard J. Oulton
and Ava L. Oulton
8515 Mayland Drive
Richmond, Virginia 23294
(804) 747-1777

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

THE WYNDHAM FOUNDATION, INC.)
a Virginia nonstick corporation,)
)
Complainant,)
)
v.)
Chancery No. CH 99-001468-00
)
RICHARD J. OULTON, *et ux*)
)
Respondents.)

FINAL DECREE

THIS MATTER having come before this Court for trial on June 6 and 7, 2001, and for post-trial motions for attorney's fees and costs, reconsideration of the definition of the term "structure" and appeal bond on July 20, 2001; upon consideration of the argument of counsel and the entire record herein; it is, therefore, hereby DECREED as follows:

1. The Respondents' property in Wyndham, Lots 2,3 and 4 of Dominion View Estates, is subject to the Wyndham Declaration of Covenants, Conditions and Restrictions, The Wyndham Designs Guidelines and The Dominion View Estates Guidelines;

2. The Respondents' freestanding permanent flagpole is a "structure" as contemplated by the Wyndham Declaration of Covenants, Conditions and Restrictions and, therefore, its placement on the exterior of the Respondents' property is subject to the appropriate approval from The Wyndham Foundation, Inc.;

3. § 55-513.1 of the *CODE OF VIRGINIA* (1950, as amended) is inapplicable to this case because it was passed by the General Assembly and enacted after the Respondents' purchase of their property in Wyndham, and it not retroactive in effect;

4. The First Amendment of Constitution of the United States of America does not bar the application of the Declaration, The Wyndham Design Guidelines and The Dominion View Estates Guidelines to the placement of flagpoles on lots within the Wyndham community;

5. The Complainant's Motion for Partial Summary Judgment, heard on May 25, 2001, was granted as it pertained to the lack of retrospective application of

§ 55-513.1, denied as it pertained to the arguments related to the First Amendment of the Constitution of the United States and denied as it pertained to the covenants of the Wyndham Foundation;

6. The Respondents, at their own cost and expense, shall fully dismantle and remove from the exterior of their property in Wyndham, the freestanding flagpole by September 7, 2201;

7. The Respondents shall not erect any freestanding flagpole on their property without complying with all covenants and restrictions and guidelines applicable.

8. By Statute and covenants, restrictions and bylaws applicable to this case an award of attorney's fees and costs is warranted, and therefore, a **JUDGEMENT** against the Respondents **Richard J. Oulton** and **Ava Oulton, jointly and severally**, is hereby granted to the Complainant in the total amount of **Eighty-seven Thousand Eight Hundred Fifty-eight Dollars and 58/100 ($87,858.58),** representing Eighty-two Thousand Dollars ($82,000.00) in attorney's fees and Five Thousand Eight Hundred Fifty-eight Dollars and 59/100 ($58,858.58) in costs; and

9. The Respondents shall have the right to post an appeal bond in the amount of $95,000.00 with surety as security, and upon the submission of this bond to the Clerk of the Court in compliance with all requirements of law the Complainant shall forebear in its efforts to collect or otherwise enforce its judgment against the Respondents, and the Respondents shall be entitled to refrain from compliance with paragraph 6 of this Decree during the pendency of their appeal of this ruling to the Supreme Court of Virginia.

The opinion letters of the Court dated 6/11/01 & 7/25/01 incorporated herein by reference as well as rulings contained in the transcripts.

s/L.A.Harris 8/2/01
The Honorable L.A. Harris
Judge, Henrico County Circuit Court

WE ASK FOR THIS:

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ARTICLE VIII

SITE STRUCTURES

A) **PROCESS:** Structures not enclosed by walls and used primarily for recreational purposes, are defined as site structures. This includes gazebos and open pavilions, spas, hot tubs, and swimming pools. If you wish to construct a structure and do not see it identified here or in any other article, contact the NCC to determine requirements. Any proposed site structure must be approved by the New Construction Committee (NCC).

1). To be considered by the NCC, requests for approval of any site structures shall be made on the Property Improvement Application with all requested information provided. This application must be accompanied by any drawings as required in Article III.

2). You may begin work immediately upon receiving approval from the NCC, in accordance with required conditions of the approval (if any).

B) **GUIDELINES:** The following guidelines apply to site structures. They are specific requirements which are in support of the four Primary Guidelines of Architectural Review defined in Article IV.. Every requirement may not apply in every case, and the NCC has the authority to waive requirements where it deems appropriate, or to add requirements to the extent that either action does not contradict any of the Primary Guidelines.

1) **ENVIRONMENTAL PROTECTION**

a) Except for areas specifically approved for construction or as otherwise permitted in this section, no existing vegetation shall be removed from any site in Dominion View Estates.

b) General clearing for construction of site structures shall extend no farther that 12' outside of the actual footprint.

c) Beyond he general clearing limits described above for structures and access, clearing of existing vegetation for additional landscape and view shall meet the requirements of Article V.

d) Alteration of existing topography will be permitted only as required to create positive drainage away from the structure.

2) **SITING FOR COMMUNITY AND PRIVACY**

a) All Site Structures shall be located behind the house (no farther forward that the rear corners of the house), unless approved by the NCC.

b) Sport Equipment such as basketball backboards shall not be located father forward than the front plane of the house. The location must be approved by the NCC or MC.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 26th day of February, 2002.

Richard J. Oulton, et al.,
Appellants,

against

Record No. 012456
Circuit Court No. CH99-001468-00

Wyndham Foundation, Inc.,
Appellee.

From the Circuit Court of Henrico County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ Wendy L. Ordy

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 19th day of April, 2002.

Richard J. Oulton, et al.,
Appellants,

against Record No. 012456
Circuit Court No. CH99-001468-00

Wyndham Foundation, Inc.,
Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment herein on the 26th day of February, 2002 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

By:

/s/ David B. Beach
Clerk

(2)

No. 02-[redacted]292

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In The

Supreme Court of the United States

RICHARD J. OULTON
and
AVA L. OULTON,

Petitioners,

v.

THE WYNDHAM FOUNDATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of Virginia

BRIEF IN OPPOSITION

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16 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether a party may appeal in the United States Supreme Court an issue not litigated at trial nor on appeal at the state level?

II. Whether the First Amendment applies to this case?

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The named petitioners are identified in the petition for writ of certiorari.

The Respondent is a non-profit, non-stock corporation organized pursuant to the Virginia Non-Stock Corporation Act, 13.1 Va. Code. Ann. §§ 801-980, and thus there are no publicly held or parent corporations owning any stock in the corporation.

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STATEMENT OF THE CASE

The Petitioners, Richard J. and Ava L. Oulton (hereafter, "Oultons"), neglected several significant points in their rendition of this case's history. The First Amendment was cited in their initial response to the Bill of Complaint of the Respondent, The Wyndham Foundation, Inc. ("Wyndham"), but thereafter played no part in the case or the trial until closing argument, when the Oultons offered to submit a brief on the subject. It was not raised on the appeal to the Supreme Court of Virginia until after the appeal was denied, and then only in the Petition for Rehearing. Finally, the Oultons did not raise any issue related to "ambiguity" in the underlying covenants on the land in their appeal to the Supreme Court of Virginia.

SUMMARY OF THE ARGUMENT

This Court should deny the request for a writ of certiorari because the Oultons' Petition is based on matters that have not been litigated in the trial court or raised on appeal in the Supreme Court of Virginia. No error can be assigned to a lower court for an issue with which it has not been confronted.

Regardless of whether the Oultons have brought these issues to the attention of this Court in the appropriate manner, the First Amendment does not apply to Wyndham, a private homeowners' association.

REASONS FOR DENYING THE WRIT

I. The Oultons' claims of violation of First Amendment rights and ambiguity of restrictive covenants are not presented properly to this Court for review.

The Oultons did not maintain their First Amendment claim throughout the proceedings, contrary to their contention in the Petition. The First Amendment was not raised during the trial until closing arguments, and even then it occurred after Wyndham's rebuttal argument.

In her closing, the Oultons' counsel said of Wyndham, "They are not a form of government." (Trial Trans. at 325.) In rebuttal, Wyndham's counsel stated that this eliminated any consideration of the First Amendment, which had been pled in the original responsive pleading but of which nothing further had been heard. Following this rebuttal, the Oultons' counsel offered to submit a brief on the subject of the First Amendment and its relation to this case.

The Oultons raised nine (9) issues in their appeal to the Supreme Court of Virginia, not a one of which involved the First Amendment. They later filed a Motion for Leave to Amend Petition for Appeal with the intention of including an argument on this issue. The motion was denied. After the denial of their appeal they filed a Petition for Rehearing that included an argument alleging a violation of First Amendment rights.

Most telling, however, is the Oultons' inability to point this Court to any portion of the record on this subject. Rule 14.1(g)(i) of this Court requires a Petition for Writ of Certiorari to specify:

> the stage in the proceedings, both in the court of first instance and in the appellate court, when the federal questions sought to be reviewed were raised . . . with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on writ of certiorari. Sup. Ct. R. 14.1(g)(i).

The Oultons' Petition plainly fails to comply with this Rule, in effect confessing the inability to present a federal question for review by this Court. This cannot come as a surprise, since Richard Oulton admitted to the trial judge that he had suffered no such transgression. In a telling colloquy between the judge and Mr. Oulton during his testimony (and addressing the alleged hindrance Wyndham had placed upon his display of any flags) the following exchange occurred:

> THE COURT: And they never told you you could not put the flag up.
>
> THE WITNESS: No. You're right, sir.

(Trial Trans. at 202.)

This Court has taken a dim view of appellate claims which surface for the first time on appeal. "In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioner's claims that were not raised or addressed below," *Yee v. City of Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, (1992). In *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, (1997), this Court further explained that:

> When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, . . . and the aggrieved party bears the burden of defeating this assumption, . . . by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.' *Id.* at 87, 117 S.Ct. at 1029 (citations omitted); quoting *Webb v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1894, (1981).

The Oultons' Petition to this Court contains no attempt to explain this deficiency despite their obligation to overcome "this assumption."

As noted above, the Oultons eventually raised a First Amendment claim in their Petition for Rehearing to the Supreme Court of Virginia and they now address the issue of restrictive covenant ambiguity – hardly a federal question – for the first time on appeal to this Court. This presents a situation similar to the procedural history of *Adams*, *supra,* where this Court noted "we have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Id.* at 89, 117 S.Ct. at 1028 n.3. This Court's reasoning in refusing the appeal in *Adams* rested on the important consideration of comity, and it noted that "'it would be unseemly in our dual system of government' to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider," *Id.* at 90, 117 S.Ct. at 1031; *quoting Webb* at 500, 101 S.Ct. at 1893 (citations and internal quotation marks omitted). These considerations apply no less forcefully to the Oultons' Petition and call for the same result.

This Court has not held whether the rule requiring proper presentation of a federal question in the lower court is a jurisdictional or prudential one, *see, Yee* at 533, 112 S.Ct. at 1531-1532. Wyndham respectfully suggests that by either standard the Oultons' Petition should be denied for failure to present these claims, including that of an issue of federal law, in a proper manner.

II. The First Amendment does not apply to this case.

A. The Foundation is not a state actor.

"It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state," *Hudgens v. National Labor Relations Board,* 424 U.S. 507, 513, 96 S.Ct. 1029, 1033 (1976). The Foundation is an entirely private, incorporated homeowners' association, whose members make a voluntary choice to join when they purchase property in the Wyndham community. Wyndham contains approximately 1500 privately owned housing units and includes recreational facilities (such as a golf course and swimming pool, which are not open to the public). The Foundation exercises architectural control over the homes in Wyndham through the covenants and restrictions placed on the properties by its developer. All homeowners in Wyndham are on notice of these covenants and architectural control requirements before they purchase their homes and they voluntarily accept these rights and obligations along with ownership of land within the Association. Wyndham is a private community association and is in no way a state actor bound by the Constitution to protect free speech.

This Court carved out a narrow exception to the general rule that Constitutional rights are not guaranteed against private entities in the case of *Marsh v. Alabama,* 326 U.S. 501, 66 S.Ct. 276 (1946). In *Marsh,* a privately-owned company town was found to provide all of the "public functions" of a municipality and thus could not curtail the First Amendment rights of a Jehovah's Witness handing out literature on a busy street corner. *Id.* at 501, 66 S.Ct. at 279. In subsequent decisions, the Court emphasized the narrow application of this "public function" exception to "the very special situation of a company-owned town, complete with streets, alleys, sewers, stores, residences, and everything else that goes to make a town." *Hudgens* at 516, 96 S.Ct. at 1034; quoting *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U.S. 308, 330-331, 88 S.Ct. 1601, 1615 (Black, J., dissenting) (1968).

In *Marsh,* the company-owned town had all of the outward appearances of a municipality, including residences, streets, shopping district, and sheriff's office owned and operated by the corporation. This unique situation is in no way analogous to the community in question in this case. Wyndham is a neighborhood development of individually owned residences and privately owned recreational facilities not open to the public. The Foundation does not operate roads, sewers, schools, waste treatment facilities, post offices, or any of the factors indicating "all the characteristics of any other American town." *Marsh* at 501, 66 S.Ct. at 277. These facts expose the incongruity of the Oultons' proposition that they somehow chose to withdraw from local government control in favor of homeowner association government. As the Fourth District Court of Appeals of Florida held in evaluating the

"public functions" of a homeowners association in a similar Constitutional analysis:

> [T]he services provided by a homeowners' association, unlike those provided in a company town, are merely a supplement to, rather than a replacement for, those provided by local government. As such, it cannot be said that the homeowners' association in this case acts in a sufficiently public manner so as to subject its activities to a state action analysis. *Brock v. Watergate Mobile Home Park Association, Inc.*, 502 So.2d 1380, 1382 (1987).

Another exception to the rule that Constitutional rights are not guaranteed against private entities may be found where "there is a sufficiently close nexus between the state and the challenged action" of a heavily regulated entity. *Jackson v. Metropolitan Edison Company,* 419 U.S. 345, 351, 95 S.Ct. 449, 453 (1974). The Oultons surprisingly cite *Jackson* for this proposition in their Petition, even though this Court found the heavily regulated utility with a governmentally protected monopoly in that case not to be a state actor for purposes of applying the Fourteenth Amendment. *See, id.* at 358-359, 95 S.Ct. at 457. As the Court held in that case, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State. . . . " *Id.* at 350, 95 S.Ct. at 453.

There is no nexus between Wyndham and the Commonwealth of Virginia which even remotely approaches qualifying the former as a state actor. Wyndham is incorporated under the auspices of the Virginia Non-Stock Corporation Act, 13.1 Va. Code Ann. §§ 801-980, and is subject to the Virginia Property Owners' Association Act,

55 Va. Code Ann. §§ 508-516. Its nexus with the state is no closer than any of the privately owned, incorporated businesses which are subject to state regulation, such as utilities, beauty salons, and car dealerships, none of which are state actors.

In summary, Wyndham does not meet the narrow criteria expounded in either the "public function" or "state involvement" tests in order to be classified as a private entity-state actor for Constitutional protection purposes. It is a private, incorporated association and its actions are not restricted by the Constitutional protections of the First Amendment.

B. A pole is not a protected symbol of expression.

"The Court for decades has recognized the communicative connotations of the use of flags," *Spence v. Washington,* 418 U.S. 405, 410, 94 S.Ct. 2727, 2730 (1974). Neither the Henrico County Circuit Court decree, the Virginia Supreme Court decision, nor the Wyndham covenant restriction at issue bar the display of flags.

As related above, Wyndham never told the Oultons that they could not display a flag on their property. In true point of fact, the Wyndham Design Guidelines provide for flags to be flown on house-mounted poles. (See Exhibit A to this Brief in Opposition.) Wyndham regulates no more than the installation of a structure on the Oultons' lot, pursuant to the authority granted to it by the Oultons when they purchased their property and accepted the covenants applicable to it. The decisions of the lower courts do no more than uphold this authority and grant no

further expansive power to the Association to outlaw or even regulate flags.

The Oultons suggest that they should be able to build any structure on their property, whether a pole or a pyramid, in complete contravention of the covenants and restrictions on their property, as long as the structure contains or displays a flag. The most tortured interpretation of the First Amendment could not support such an absurd result.

CONCLUSION

The Oultons appeal to this Court for reasons that are argued for the first time in their Petition for Writ of Certiorari. It is improper to ask a higher court to revisit and reverse a lower court's decision when the latter has not had the opportunity to address these same issues. The Petition should be denied for the reasons and authorities stated above.

Respectfully submitted,

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Exhibit A

The Wyndham Design Guidelines

Article X, Section 3(a)(10). No flag or flagpole of any size, shape, or form, temporary or permanent, shall be permitted on the exterior of any portion of a Unit or improvement thereon, except that the New Construction Committee or the Modifications Committee may grant written approval for a reasonable and aesthetic house mounted pole or poles which are attached to and extend from the façade of the house. One house mounted pole may be attached to and extend from the façade of a house without the prior written approval of the Modifications or New Construction Committee as long as the pole does not exceed 6 feet in length and the flag displayed on the pole does not exceed 4 feet x 6 feet.

Outside of this stated approved guideline, the display of any flag or the installation of any necessary supporting structure(s) for any flag on or within the Properties, including on the exterior of any Unit or any improvement thereon within Wyndham, is hereby expressly prohibited without the prior written approval of the New Construction Committee or the Modifications Committee. For the purposes of this Section, any flag or flagpole or necessary supporting structure for any flag on any portion of a Unit is deemed an 'exterior alteration or modification of existing improvements' as contemplated by Article XI of the Declaration of Covenants, Conditions and Restrictions for Wyndham."

Effective April 1, 2000.